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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner*,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER COLUMBIA BROADCASTING SYSTEM, INC.

OPINIONS BELOW

The court of appeals' opinion (App. 446-91) is reported at 450 F.2d 642 (1971). The opinion of the Federal Communications Commission in *Democratic National Committee* (App. 247-87) is reported at 25 F.C.C. 2d 216 (1970). The opinion of the Commission in *Business Executives' Move for Vietnam Peace* (App. 357-417) is reported at 25 F.C.C.2d 242 (1970).

JURISDICTION

The judgment of the court of appeals (App. 492-93) was entered on August 3, 1971. Petitions for rehearing were denied by an order of the court of appeals (App. 494-95) entered on October 4, 1971. The petitions for certiorari were filed on January 3, 1972, and granted by this Court by order entered on February 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(h), provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

QUESTION PRESENTED

Under the regulatory scheme established by the Communications Act and the policies of the Federal Communications Commission, broadcasters are required to present contrasting views on controversial public issues. The question presented is whether this regulatory scheme is constitutionally sufficient and whether the First Amendment requires the Commission to take the further step of compelling broadcasters who have presented contrasting views on such issues to sell advertising time to partisans for the presentation of their views.

STATEMENT OF THE CASE

These consolidated cases bring to this Court a decision by the Court of Appeals for the District of Columbia Circuit [1] that under the First Amendment the Federal Communications Commission (the "Commission") must require broadcasters to sell advertising time for partisan announcements on public issues. In so ruling, the court reversed two decisions of the Commission which held that licensees, who are required by the Commission's fairness doctrine to present contrasting views on controversial issues of public importance, are not also required to sell time for the presentation by partisans of their views. *Democratic National Committee*, 25 F.C.C. 2d 216 (1970) (hereinafter *"DNC"*); [2] *Business Executives Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970) (hereinafter *"BEM"*).[3]

1. The Commission's *DNC* Ruling.

The *DNC* case arose from a request to the Commission by DNC for a declaratory ruling that broadcast licensees may not refuse to sell time to "responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [4] DNC did not indicate what views it desired to present in purchased time, nor did it suggest that its views—or those of anyone else—on any particular issue were not being presented by licensees. DNC also made no claim that any licensee had failed to fulfill its responsibilities under the fairness doctrine. Rather, DNC asserted that, regardless of compliance with the fairness doctrine, a broadcaster's refusal to sell time to

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[1] App. 446-91.

[2] App. 247-87.

[3] App. 357-417.

[4] App. 15, 33.

it and other "responsible entities" violated the First Amendment and the Communications Act.[5]

In response to the Commission's invitation for comment,[6] Petitioner Columbia Broadcasting System, Inc. ("CBS"), which is the licensee of radio and television stations and also operates a radio and television network, urged the Commission to deny the requested ruling.[7] CBS argued that the ruling was required neither by the First Amendment nor the Communications Act, and indeed would be inconsistent with the statutory scheme and the First Amendment and detrimental to the public interest.

The CBS response described in detail CBS' policy with respect to the discussion of public issues.[8] That policy, basically, is to present contrasting views on public issues through an extensive schedule of news and public affairs broadcasts.[9] As part of this journalistic effort, direct

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[5] App. 33.

[6] App. 37.

[7] App. 48-80. American Broadcasting Companies, Inc. ("ABC") also filed a response emphasizing its responsibility to provide full and fair discussion of controversial issues and spelling out a general policy of declining to sell time for discussion of public issues "absent special public interest considerations." It opposed any ruling requiring sale of time to all "responsible entities." App. 42-46.

While National Broadcasting Company ("NBC") filed only a short response merely noting its willingness to sell time to DNC (App. 47), it has filed an *amicus* brief in this Court supporting the position of petitioners. As indicated in its brief, NBC does on occasion sell time for discussion of public issues. But, as the NBC brief makes clear, its ability to make the critical judgments of selection under its current policy would be drastically restricted by the court of appeals' decision.

[8] App. 50-58.

[9] The CBS response described in detail the large quantity of news and public affairs broadcasts prepared by CBS News, showing that in the two-year period 1968-1969, CBS presented 1,354 hours of

exposure is provided for partisans and partisan views, on a free basis, in daily news broadcasts. Partisans also regularly appear on public affairs series such as FACE THE NATION, SIXTY MINUTES and CBS REPORTS.[10] In addition, partisans are also given opportunities to make direct presentations on frequent special news broadcasts. Thus, for example, direct access is periodically provided, without charge, for Presidential appearances and for leading opposition spokesmen for comment on specific issues or on issues selected by the spokesmen themselves.[11]

CBS pointed out that it had also adopted a related policy of declining generally to sell time for the presentation of views on controversial issues of public importance because it had concluded that selling time for this purpose would substantially undermine its journalistic efforts.[12]

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news and public affairs broadcasts, including 100 hours of prime-time documentaries and 338 hours of regularly-scheduled hard news broadcasts. App. 52.

[10] App. 54-55, 154-57. In this connection, CBS submitted to the Commission a detailed exhibit showing the numerous partisan views on one issue—the Vietnam War—included in broadcasts presented by CBS News on the CBS Television Network and in broadcasts presented by a representative CBS-owned station (WCBS-TV, New York). App. 81-242.

[11] For the last several years CBS has provided time for a response by opposition Congressional leaders to the President's State of the Union address. See also *Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. D.C. ——, 454 F.2d 1018 (1971), involving a "Loyal Opposition" broadcast presented by CBS. A recent example of a special broadcast directly presenting partisan views is provided by an April 30 CBS News Special Report, "The Issue of Busing," which presented opinions on this controversial issue by a number of partisans on both sides.

[12] Consistent with the Congressional policy reflected in Section 315 of the Communication Act, 47 U.S.C. § 315, and the recently enacted Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), CBS sells time to candidates, their supporters, political parties and spokesmen on ballot issues during election campaigns, and sells advertising time outside of election campaigns to political

The Commission rejected DNC's request for a general declaratory ruling that licensees must sell time for partisan presentations. It pointed out that the legislative history and language of the Communications Act make clear that licensees are not "common carriers" who passively transmit the views of others, but rather are trustees of the frequencies licensed to them, obligated to present contrasting views on controversial issues of public importance. It is through performance of this trust that the "paramount right and interest of the public to be fully informed is protected." [13]

The Commission emphasized that in fulfilling its responsibilities under the Commission's fairness doctrine a licensee must present representative views; that it cannot rule out coverage of controversial viewpoints because it disagrees with them; and that "partisan voices must be included." [14] The Commission noted that no Commission policy precludes the sale of time for discussion of issues, provided that the licensee fully complies with its fairness obligations.[15] But the Commission found that it was not in the public interest to *require* licensees, who already are presenting contrasting views on public issues, also to sell time to partisans to present their particular views. It found, further, that such a requirement would interfere with and undermine the fairness doctrine and the "public trustee" scheme of regulation chosen by Congress and approved by this Court in *Red Lion Broad-*

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parties for fund raising and for expression of views on public issues.

Emphasizing the Section 315 policy, the Commission held in its *DNC* ruling that licensees must sell time for short fund-raising announcements by significant political parties. At the same time it noted that the current policies of the three major networks—ABC, CBS and NBC—were consistent with that holding. App. 269-73.

[13] App. 268.

[14] App. 259.

[15] App. 265.

casting Co. v. *FCC*, 395 U.S. 367 (1969).[16] The Commission concluded that such a requirement would mean that "the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which '. . . has the financial resources and interest to purchase sustained access to the mass communications media. . . .'" [17]

Commissioner Johnson dissented, urging the adoption of an even broader requirement for sale of time than that suggested by DNC.[18] He recognized, however, that an individual right to purchase time for public issue discussion might well be incompatible with the fairness doctrine. Should this prove to be the case, Commissioner Johnson stated, the fairness doctrine "could be suspended" to make the requirement of individual paid access feasible.[19]

2. The Commission's *BEM* Ruling.

On the same day that it denied DNC's request for a declaratory ruling, the Commission also rejected a specific complaint of BEM, an organization opposing the Vietnam War, against radio station WTOP (AM), Washington, licensed to Post-Newsweek Stations, Capital Area, Inc., petitioner in No. 71-865.[20] BEM alleged that WTOP

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[16] App. 263-64.

[17] App. 263, quoting *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 34, 405 F.2d 1082, 1102 (1968), *cert. denied*, 396 U.S. 842 (1969). The Commission also recognized that licensees might reasonably conclude that positions on complex issues ought not to be "hawked" like soap. App. 264. Indeed, a number of thoughtful observers have recently criticized the use of spot announcements in election campaigns. *E.g.*, The Twentieth Century Fund, *Voter Time Report* 15 (1969); *Wall Street Journal*, March 9, 1972, p. 12; 118 CONG. REC. S 984-85 (daily ed. Feb. 2, 1972) (remarks of Sen. Stevenson).

[18] App. 274-87.

[19] App. 281.

[20] App. 357-68.

had violated the fairness doctrine by failing adequately to present views opposed to the War and should therefore be compelled to provide BEM free air time to present spot announcements opposed to the War. In addition BEM complained that the station's refusal to sell BEM advertising time to present its announcements violated its rights under the First Amendment.[21]

In response to the complaint, WTOP pointed to its extensive coverage of the Vietnam War issue, both through news coverage and the direct presentation of the views of various partisans,[22] and stated that each of the viewpoints in BEM's proposed announcements had been expressed over the station on a number of occasions.[23] It concluded that broadcasting BEM's announcements would not contribute to further public understanding of this issue.[24]

The Commission rejected the BEM complaint. On the basis of the unchallenged showing by WTOP that it had extensively covered the Vietnam War issue and, indeed, had on other occasions presented viewpoints essentially similar to BEM's, the Commission concluded that BEM had failed to show that the fairness doctrine had been violated.[25] In addition, relying on its *DNC* opinion, the Commission held that the First Amendment did not require WTOP to sell advertising time to BEM to present its views.[26]

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[21] App. 291-96.

[22] App. 313-15.

[23] App. 352.

[24] App. 316-17.

[25] App. 358-66. Review of this aspect of the Commission's decision was not sought in the court of appeals.

[26] App. 366-68.

3. The Court of Appeals' Decision.

On petitions for review of the Commission's *DNC* and *BEM* decisions, a divided panel of the court of appeals reversed the Commission in both cases.[27] Judge Wright, for the majority of the court, held that action by broadcast licensees is equivalent to action by the government.[28] Relying on cases involving such entities as municipally-owned transit systems, the majority went on to hold that under the First Amendment the Commission must require those broadcast licensees who sell time for commercial advertising also to sell advertising time[29] for the presentation of views on public issues.[30]

Attempting to deal with the inherent scarcity of broadcast frequencies, the court below stated that the First Amendment right it was creating was limited and "abridgeable."[31] The court indicated that the Commission may impose or permit licensees to impose "reasonable" limitations on the total amount of advertising time to be sold for editorial discussion and on the amount to be sold to a single individual or group or representatives of a particular viewpoint.[32] However, the court made clear that the Commission may not permit licensees to exercise their traditional responsibility for selecting broadcast material in the public interest. Thus, the

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[27] App. 446-91.

[28] App. 455-64.

[29] Advertising time is sold by broadcasters in short "spot" time segments, typically of one minute or less. The court of appeals' holding does not apply to program time—time devoted to more lengthy presentations of entertainment, news, public affairs and other non-commercial material. App. 464-65, 482-83.

[30] App. 464-89.

[31] App. 467.

[32] App. 484, 485.

court indicated that a request to purchase time may not be rejected on the ground that the issue is one that has been fairly covered by the licensee or is of minimal interest or importance; or that the licensee has already presented without charge the views of the person or group seeking to purchase time or believes that some other person or group is a more appropriate spokesman for the particular views; or even, apparently, that the licensee deems the material sought to be presented to be offensive or otherwise unsuitable for broadcasting into the home.[33]

Judge McGowan dissented, expressing concern that the new First Amendment right created by the court would undermine the public's interest in being informed.[34] The present regulatory system—requiring licensees "to advance the public's right to know" through presentation of contrasting views on controversial issues—was deliberately chosen by Congress, Judge McGowan pointed out, and "has never been thought to be other than within the permissible limits of constitutional choice."[35] Judge McGowan emphasized that the majority's holding would place a "constitutional straightjacket" on the Commission,[36] requiring it to scrap the present regulatory system provided by Congress for one "in which money alone determines what issues are to be aired, and in what format."[37]

After petitions for rehearing were denied,[38] CBS, the Commission and the United States, Post-Newsweek Sta-

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[33] App. 469, 471-73, 477, 485.

[34] App. 489-91.

[35] App. 490.

[36] App. 491.

[37] App. 490.

[38] App. 494-95.

tions, and ABC filed petitions for certiorari.[39] On February 28, 1972, this Court granted the petitions and consolidated the four cases. At the same time, it recalled and stayed the mandate of the court of appeals.

[39] No. 71-863, *CBS* v. *DNC*; No. 71-864, *FCC* v. *BEM and DNC*; No. 71-865, *Post-Newsweek Stations, Capital Area, Inc.* v. *BEM*; No. 71-866, *ABC* v. *DNC*.

SUMMARY OF ARGUMENT

The decision below erroneously holds that the existing scheme of broadcast regulation, which requires licensees to act as trustees for the public interest and to present contrasting views on public issues, is constitutionally inadequate. If the decision below were to stand, Congress and the Commission would be permanently compelled to include in the regulatory scheme a requirement that advertising time be sold for partisan announcements.

The holding of the court of appeals is entirely unprecedented. None of the decisions of this Court or other courts which have considered the application of the First Amendment to broadcasting has suggested that broadcasters are directly subject to the prohibitions of the Amendment on the theory that they are engaged in "state action." None has suggested that the First Amendment confers an affirmative right on members of the public to purchase broadcast time. The courts that have been faced directly with such claims have squarely rejected them. *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

I.

The decision below finds no support in the First Amendment. The primary purpose of the First Amendment is to protect speech and press from governmental intrusion. It would be entirely anomalous if broadcasters, who are themselves protected by the guarantee of a free press, were held subject directly to the restraints of the First Amendment. The result would be that every editorial decision of broadcast licensees would raise an issue of First Amendment dimension, and the courts and the Commission would be compelled to intrude deeply into the functions of broadcast journalists.

Even if the First Amendment operated as a direct restraint on broadcaster action, it would not sanction the result reached by the court below. As this Court has recognized, the broadcast medium is characterized by the limited number of frequencies available for broadcasting, and under these circumstances, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." Rather, it is the public's interest in access to ideas that is "paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388, 390 (1969). The existing scheme of broadcast regulation is based on a fundamental policy judgment by Congress that this interest of the public will be better served by a system of licensee trusteeship, in which broadcasters may reasonably determine what material should be broadcast in the public interest, than by a common carrier system based on indiscriminate access.

In the critical area of public affairs, the regulatory vehicle for ensuring that licensees act in the public interest is the fairness doctrine. By assuring that each licensee will present contrasting views on the vital issues of the day, the fairness doctrine vindicates the public interest in being informed. And it does so in a way completely consistent with the First Amendment interest in robust and partisan debate. Licensees may not exclude particular views because they disagree with them, and must include partisan views in their coverage of public issues. The existing regulatory system not only assures vindication of the public's interest in receiving full information, but also assures that there will be no discrimination against controversial issue discussion in the broadcast medium. The regulatory scheme thus sharply distinguishes broadcasting from other "forums," such as public parks and municipal transit systems, which have no comparable legal obligation to present contrasting views on controversial public issues.

There is no evidence in the record in this case that the existing regulatory scheme does not satisfy the First Amendment interest of the public in access to contrasting views on public issues. The evidence is to the contrary. CBS, for example, submitted a detailed showing that its news and public affairs broadcasts ensure the presentation of contrasting views on controversial issues and include ample opportunity for partisans to present their views directly.

The new right created by the court of appeals is fundamentally inconsistent with the goals of the First Amendment. By eliminating licensee discretion, the decision of the court of appeals would inevitably undermine the fairness doctrine and frustrate the public's interest in being informed. The responsible choices of the broadcast press as to which issues, views and speakers are to be presented would be replaced by the haphazard choices of those who can afford to purchase advertising time to present their views. As the Commission put it, the "agenda of public discussion" would be set "by the affluent." App. 263.

Moreover, any effort to ensure that the required sale of advertising time would not distort debate on issues would inevitably involve the Commission and the courts in making decisions as to which speakers are to be heard, which issues are to be discussed, and how much time is to be devoted to particular issues and views. Such increased governmental intrusion in day-to-day journalistic decisions would pose a serious threat to a free broadcast press.

II.

The court of appeals also erred in holding that action of a broadcast licensee is "state action." Broadcast licensees conduct private enterprises; they are private journalists whose essential separateness from the government is a central principle of both the Communications Act and the First Amendment.

The criteria relied upon by the court of appeals for finding state action are plainly unsound. The mere existence of licensing and regulation has never been held sufficient to make a private business the equivalent of the state. Nor does the Commission's refusal to compel broadcasters to sell advertising time convert broadcaster action into state action. In no sense does such Commission refusal constitute an affirmative endorsement of the policy of those broadcasters who refuse to sell advertising time for partisan announcements. Finally, the fact that broadcasting is an important organ of communication hardly argues for a finding of state action: to the contrary, it emphasizes the constitutional importance of treating the broadcast press, like the printed press, as separate from the government.

ARGUMENT

INTRODUCTION

Three years ago, in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), this Court issued its first comprehensive opinion on the application of the First Amendment to broadcasting and to the regulatory scheme governing broadcasting. In that landmark decision, the Court held that in light of the inherent limitations of the broadcast medium, "it is idle to posit an unabridgeable right to broadcast comparable to the right of every individual to speak, write or publish." [40] The Court sustained the fairness doctrine, under which the Commission requires broadcast licensees to present contrasting viewpoints on controversial public issues, finding that the doctrine serves the central First Amendment interest of the public in access to information.

Since that time, broadcast licensees and the Commission have been faced with a multitude of challenges to the scheme of regulation upheld in *Red Lion*. Ignoring the inherent limitations of the broadcast medium, various individuals and groups have claimed a right to present their views on particular issues, whether or not the licensee has complied with its obligations under the fairness doctrine. In its decisions in the *DNC* and *BEM* cases, the Commission carefully examined and rejected the claim that the Communications Act or the First Amendment creates such a right. The Commission reaffirmed its view that the asserted individual right to purchase time is incompatible with a limited-time, limited-frequency medium, and found that such a right would undermine the fairness doctrine and the public's interest in being informed.

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[40] 395 U.S. at 388.

The majority of the court below has rejected this judgment of the expert agency entrusted by Congress with the sensitive assignment of determining how best to reconcile the conflicting demands on a broadcast medium characterized by change and beset by pressures from many sources.[41] In so doing, the court of appeals has drastically departed from existing authority.

The court below conceded that there was "scant precedent" for its holding and that earlier decisions of the courts of appeals have held that there is no individual right to purchase broadcast time for the discusion of controversial issues.[42] Thus, in the leading case of *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the Third Circuit rejected a First Amendment claim by a religious organization seeking to compel a radio station to sell it time. The court found that action by broadcasters was not the equivalent of action by the state. The court held further that plaintiffs' rights had in any event not been violated. Recalling this Court's observation in the *NBC* case that "unlike other modes of expression radio inherently is not available to all," [43] the court stated:

> "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum . . . . [A] radio broadcasting station is not a public utility in the sense that it

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[41] In its most recent decision interpreting the Communications Act, this Court overturned a decision of another court of appeals which had substituted its judgment for that of the Commission on a comparable question calling for administrative expertise. *United States* v. *Midwest Video Corp.*, —— U.S. —— (No. 71-506, decided June 7, 1972), slip op. at 26 (plurality opinion). Mr. Chief Justice Burger, concurring in the result, emphasized the need to rely on the Commission's "generations of experience and 'feel' " in such complex areas. Concurring op. at 2.

[42] App. 456.

[43] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943).

must permit broadcasting by whoever comes to its microphones." 151 F.2d at 600-01.[44]

The First Circuit reached an identical result in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

Until now these long-standing decisions of the First and Third Circuits had never been questioned by any court. Apart from the decision below, not one of the numerous decisions of this Court and the lower federal courts which have treated free speech and free press issues in broadcasting has suggested that the First Amendment compels Congress and the Commission to require broadcasters to sell advertising time for the discussion of public issues, or that the Commission's fairness doctrine does not adequately satisfy the demands of the First Amendment in the broadcast medium.[45]

To the contrary, it has long been held that "broadcasters are not common carriers and are not to be dealt with as such";[46] that "no individual member of the pub-

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[44] The Third Circuit has recently reaffirmed *McIntire* in rejecting the First Amendment claims of an author to have his article published in the law review of a state law school. *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[45] *Red Lion, supra; National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Democratic National Committee* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1637, decided Feb. 2, 1972), *petition for cert. pending* (Oct. Term, 1971, No. 71-1405); *Green* v. *FCC*, 144 U.S. App. D.C. 353, 447 F.2d 323 (1971); *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470 (2d Cir. 1971); *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969); *Anti-Defamation League* v. *FCC*, 131 U.S. App. D.C. 146, 403 F.2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, —— U.S. —— (40 U.S.L.W. 3463, March 27, 1972); *Post* v. *Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971). *Cf. Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968).

[46] *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

lic has the right of access to the air";[47] and that, so long as they carry out their fairness doctrine responsibilities, "licensees may exercise their judgment as to what material is presented and by whom."[48]

Untroubled by the lack of direct precedent for its holding, the court below relied on a number of decisions of state and federal district courts which have recognized a right to purchase advertising space for editorial messages in *governmentally* owned, controlled or financed entities such as municipal transit systems.[49] In these cases, all of which involved "state action," the courts held that since these "forums" sold advertising space for commercial purposes, they were also required to sell space to those who wish to present messages on public issues.[50]

The questions involved in those cases have never been passed on by this Court, and the correctness of those decisions need not be reached here, for they are clearly inapplicable. Broadcaster action is not "state action."

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[47] *Green* v. *FCC*, 144 U.S. App. D.C. 353, 358, 447 F.2d 323, 328 (1971).

[48] *Ibid.* See also *Post* v. *Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971).

[49] App. 475.

[50] *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); *Hillside Community Church, Inc.* v. *Takoma*, 455 P.2d 350 (Wash. Sup. Ct. 1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982 (1967).

The court also relied upon two cases involving state-supported school newspapers. *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969). We submit that these cases were incorrectly decided because there is no right of individual access to a journalistic medium. In any event, these cases are distinguishable because they involved state-financed entities clearly engaged in state action and because there is no regulatory scheme applicable to newspapers which ensures the presentation of contrasting views on controversial issues.

(See pp. 47-55, *infra*.) But even if it were, application of the First Amendment to the broadcast medium would not compel Congress and the Commission to require broadcasters to sell advertising time for the expression of partisan views.

As we discuss below, in the broadcast medium the central First Amendment goal is an informed and enlightened public. In pursuit of this goal, Congress and the Commission have chosen a regulatory scheme under which broadcasters, as public trustees, are required to present contrasting views on public issues. This regulatory scheme is unique to broadcasting; a public park or municipal transit system is subject to no comparable requirements.[51]

The regulatory scheme in broadcasting ensures that the public's interest in being informed will be vindicated. It also ensures that there will be no discrimination in the broadcast medium against controversial issue discussion. In light of the responsibility imposed on broadcasters to present constrasting views on controversial issues, the refusal of a licensee to sell time for partisan announcements does not represent a discrimination —invidious or otherwise—against speech on public issues.

Whether or not Congress and the Commission have the power to adopt a requirement of paid partisan access to augment or replace the fairness doctrine, nothing in the First Amendment compels them to do so or invalidates their conclusion that the existing scheme of regulation vindicates the public's interest in being informed.

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[51] This important distinction was adverted to by the California Supreme Court in the very case from which the court below quoted so extensively. See *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 434 P.2d 982, 989-90 (1967).

I. THE FIRST AMENDMENT DOES NOT REQUIRE CONGRESS AND THE COMMISSION TO COMPEL BROADCAST LICENSEES TO SELL ADVERTISING TIME FOR PARTISAN ANNOUNCEMENTS ON PUBLIC ISSUES.

Even if broadcaster action were "state action," this would not require wholesale application of the requirements of the Constitution to broadcasters as if they were the equivalent of the government. A finding of state action, rather, requires a reasoned inquiry into what the Constitution requires in the particular context. Thus, for example, where racial discrimination is at issue, a finding of state action has required that nominally private businesses be directly subject to the limitations of the Equal Protection Clause.[52] A different situation prevails where the First Amendment is involved.[53]

The primary function of the First Amendment is to protect against governmental intrusion on freedom of speech and press. It is entirely anomalous to suggest that the broadcast press, which is itself protected by the First Amendment against such governmental interference, is subject to the same restraints as the government. Indeed, to apply the First Amendment directly to broadcaster conduct would mean that every editorial decision by broadcasters would be tested by First Amendment standards applicable to restrictions on government censorship.[54] Far from serving the purpose of

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[52] See, *e.g.*, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Hunter* v. *Erickson*, 393 U.S. 385, 391-92 (1969); *McGlotten* v. *Connally*, 338 F. Supp. 448, 458 n.53 (D.D.C. 1972).

[53] See generally FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 26-27 (1971); King, *Rebuilding the "Fallen House"—State Tuition Grants for Elementary and Secondary Education*, 84 HARV. L. REV. 1057, 1075-76 (1971).

[54] If this seems far-fetched, it need only be pointed out that precisely such a claim is being seriously advanced by a producer

the Amendment, this would subvert its purposes by injecting oversight by the Commission and the federal courts into the very heart of broadcast journalism.

In any event, under the First Amendment a particular medium is not "necessarily subject to the precise rules governing any other particular method of expression." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). Differences in the characteristics of particular media "justify differences in the First Amendment standards applied." *Red Lion, supra*, 395 U.S. at 386.[55] There are compelling reasons for applying different First Amendment standards concerning access to a journalistic medium such as broadcasting from those applicable to access to a municipal transit system or park.[56]

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of a former CBS series in litigation in a United States District court. *Smothers* v. *CBS*, C.D. Cal. No. 69-1898-AAH.

[55]This Court has made clear that even a shopping center is different from a municipal facility for purposes of the First Amendment. In *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), this Court held that the First Amendment requires shopping center owners to open their facilities to peaceful labor union picketing. At the same time, the Court took pains to note that: "[I]t may well be that respondents' ownership of the property here in question gives them various rights . . . to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality." 391 U.S. at 319.

[56] A recent decision involving a magazine that was an organ of a state educational institution (and thus engaged in "state action") makes clear that a journalistic medium is not to be treated like an ordinary public facility. There the court specifically held that the First Amendment did not deprive the editors of a law review of their right to select material for publication or compel them to grant access for the expression of particular views. *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

A. The Goal of the First Amendment in Broadcasting Is to Produce an Informed Public, Rather Than to Guarantee Access to Partisan Spokesmen to Present Their Particular Views.

At the outset it should be recognized that the function of the First Amendment is to protect against governmental interference in speech and press, not to afford individual opportunities for access to particular forums. While the First Amendment may limit restrictions on access to particular government-controlled forums,[57] any claim of access must be measured by the central goal of the First Amendment, which is to produce "an informed public capable of conducting its own affairs"[58]—"a more capable citizenry and more perfect polity."[59] The crucial interest at stake is the "interest of the public in hearing all sides of a public issue." *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966). As this Court said of the struggle to establish freedom of the press, "in the ultimate, an informed and enlightened public opinion was the thing at stake." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 247 (1936). Indeed, as another panel of the court below stated in upholding the constitutionality of the Commission's cigarette fairness ruling: "Debate is not primarily an end in itself. . . . [T]he provision of information is no small part of what the First Amendment is about."[60]

Thus, the First Amendment guaranty of freedom of expression is primarily rooted, not in the value of indi-

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[57] See cases cited in note 50, *supra*.

[58] *Red Lion*, *supra*, 395 U.S. at 392.

[59] *Cohen* v. *California*, 403 U.S. 15, 24 (1971). See also *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 41 (1971) (plurality opinion); *Whitney* v. *California*, 274 U.S. 357, 375-77 (1927) (Brandeis and Holmes, J.J., concurring).

[60] *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 34, 35, 405 F.2d 1082, 1102, 1103 (1968), *cert. denied*, 396 U.S. 842 (1969).

vidual expression for its own sake, but in the value of free expression and debate in creating an informed public. "[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." [61]

In cases involving newspapers and forums other than broadcasting not characterized by a scarcity of available opportunities, the assumption has been that the goal of an informed public is best served by protecting the right of each individual to speak or publish.[62] In broadcasting this same goal is met through different means. As this Court noted in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943), the unique characteristic of broadcasting which distinguishes it from the printed media is the scarcity of available frequencies. It follows, said the Court, that

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. . . . Because it cannot be used by all, some who wish to use it must be denied." 319 U.S. at 226.

In *Red Lion*, the Court reiterated that the basic fact of scarcity is central to the application of the First Amendment in broadcasting. The Court proceeded from the fundamental premise that

> "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, *it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.*" 395 U.S. at 388. (Emphasis supplied.)

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[61] MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

[62] Even there, the interest of the individual in exercising his freedom of speech must in a number of circumstances give way to the interests of the public as a whole. See, *e.g.*, *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 464 (1952); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

Instead, there is a collective interest in the public in "suitable access to social, political, aesthetic, moral, and other ideas and experiences." 395 U.S. at 390. It is this interest of viewers and listeners which is "paramount." *Ibid.* As the Commission aptly put it in this case, the central First Amendment interest thus described in *Red Lion* "is an issue-oriented 'right of access,' not the right of any individual to access." [63]

The court below disregarded these essential teachings. Notwithstanding this Court's clear statement in *Red Lion* that in broadcasting the public's interest in access to information is "paramount," the court of appeals asserted that this "has not been considered the central First Amendment interest." [64] And notwithstanding the basic theory of *Red Lion* and *NBC* that there cannot be a general right in members of the public at large to broadcast their own views, the court below created a broad constitutional right of paid partisan access.

In an apparent effort to harmonize its decision with *Red Lion* and *NBC*, the court below also suggested that this newly fashioned right could be rationalized even in terms of the public's interest in being informed.[65] As we now discuss, this suggestion is also plainly incorrect. The existing scheme of broadcast regulation vindicates the public's interest in access to views on public issues, and the right created by the court of appeals would substantially undermine that interest.

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[63] App. 266. This is not to suggest, of course, that each and every remedy designed to further full public information would be consistent with the First Amendment. Each case requires a careful examination of the impact of the particular regulation on freedom of speech and press.

[64] App. 466 n. 28.

[65] App. 471.

B. Congress' Chosen Scheme of Regulation, Under Which Licensees, As Trustees for the Public, Are Responsible for Presenting Contrasting Views on Controversial Public Issues, Affirmatively Serves the Public's Interest in Being Informed.

1. In Enacting the Communications Act Congress Deliberately Rejected a System of Individual Access to the Airwaves in Favor of a System of Trusteeship Regulation Designed to Vindicate the Interests of the Listening and Viewing Public.

The court below recognized in its opinion that there is no serious claim in this case that the Communications Act of 1934 (as distinguished from the First Amendment) requires broadcast licensees to sell advertising time to individuals or groups to present their particular views on public issues.[66] Nor could there be. "[T]he foundation stone of the American system of broadcasting," as the Commission stated in its landmark *Report on Editorializing*, is the "right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter. . . ." 13 F.C.C. 1246, 1249 (1949).

When Congress framed the Communications Act, it sharply distinguished between media designed for the communication of private messages, like telephone and telegraph, and broadcast radio, which was designed to inform and enlighten the listener. Those who transmit private messages for hire were made common carriers, subject to the obligation to sell time to any individual or group desiring to transmit its particular message.[67] On the other hand, Congress concluded that it could not

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[66] App. 455.

[67] See Sections 201-02 of the Communications Act, 47 U.S.C. §§ 201-02.

achieve the public information function of radio broadcasting if licensees were made common carriers.

In the area of broadcasting, Congress developed a regulatory scheme based on two major premises: First, broadcast frequencies were to be licensed by a regulatory agency for limited terms to those applicants best qualified to serve the public interest. Second, those to whom frequencies were assigned were not to have the purely passive role of carrying the messages of those who desired to purchase time; rather, licensees were to be responsible and accountable for selecting broadcast material as trustees for the interests of the public as a whole.

The fundamental decision that broadcasters are to be trustees for the public, not common carriers, underlies the entire system of broadcast regulation in the Communications Act. It is reflected in the existing provisions of Title III, under which licensees are charged to operate their facilities in the "public interest, convenience and necessity." 47 U.S.C. §§ 307(a), 309(a), 310(b), 315(a). It is reflected preeminently in the fairness doctrine, developed by the Commission and incorporated into the Communications Act in 1959[68]—under which broadcasters are obligated to present contrasting views on significant public issues. And it is reflected in Section 3(h) of the Act, 47 U.S.C. § 153(h), which expressly provides that licensees are not to be deemed common carriers, and in Section 326 of the Act, 47 U.S.C. § 326, which protects licensees from Commission censorship.

This basic policy decision is corroborated in the legislative history—both of the Communications Act of 1934 and of its predecessor, the Radio Act of 1927, 44 Stat. 1162. As the Commission emphasized in its ruling in the instant case, that legislative history shows that "Congress specifically debated and rejected the idea of the licensee

[68] See *Red Lion, supra*, 395 U.S. at 381-85.

being required to act as a common carrier with respect to transmission of comments on public issues." [69]

The legislative history makes clear that the central factor leading to the enactment of the Radio Act of 1927 was that chaos had resulted from a system in which, in the absence of effective regulation, all who wished to broadcast were free to do so.[70] It was clear to Congress that:

> "the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea . . . that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual. . . ." [71]

Pursuant to this conviction, Congress deliberately eliminated a provision in the bill which would have made broadcasters common carriers as to "any question affecting the public," because such a requirement would compel the broadcaster to "accept anything and everything that was offered him so long as the price was paid." [72]

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[69] App. 260.

[70] *NBC, supra,* 319 U.S. at 211-13; *Red Lion, supra,* 395 U.S. at 375-77.

[71] 67 CONG. REC. 5479 (1926) (remarks of Representative White), quoted in *Red Lion, supra,* 395 U.S. at 376 n.5.

[72] 67 CONG. REC. 12502 (1926) (remarks of Senator Dill). See also 67 CONG. REC. 12358 (1926). The bill as introduced contained such a provision. 67 CONG. REC. 12503 (1926); S. Rep. No. 772, 69th Cong., 1st Sess. (1926), p. 4. In the light of the criticisms of Senator Dill, quoted in the text, the bill was revised on the floor of the Senate to eliminate the common carrier provision. As passed (and as re-enacted as Section 315 of the Communications Act of 1934), this section of the Radio Act dealt only with political candidates, and created no common carrier obligation either as to candidates or as to public issues. Rather, the section required only that equal opportunities be provided to opposing candidates once the licensee had chosen to afford time to a particular candidate. Indeed, the section as enacted con-

In administering the Radio Act of 1927, the Radio Commission early adopted the view that the Act vested responsibility for broadcast material in the licensee and was inconsistent with any individual right to purchase broadcast time. In a major policy pronouncement in 1929, the agency stated that "the duties of broadcasting stations are to listeners," unlike those of common carriers, which run to the "sender" of messages. *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929). If broadcasters, like common carriers, had to accept and transmit the messages of those who could afford to pay, the Commission noted, "this obligation would extend to anything and everything any member of the public might desire to communicate to the listening public, whether it consist of music, propaganda, reading, advertising, or what-not." 3 F.R.C. Ann. Rep. at 32. Any such requirement would be both impractical and undesirable:

> "In the present state of the art there is no way of increasing the number of stations without great injury to the listening public, and yet thousands of

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tained a provision to the effect that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate [in the first instance]." Congress' concern that the Section 315 requirements not unduly inhibit or interfere with broadcast journalism was reflected in 1959 amendments exempting news and other journalistically supervised broadcasts from the equal opportunities provisions. 73 Stat. 557 (1959).

Just recently, Congress enacted, as Section 103 of the Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), a provision making it a violation of the Communications Act for a licensee willfully or repeatedly to fail "to allow reasonable access to or to permit purchase of reasonable amounts of time" by candidates for federal office. This provision represents the first time that Congress has created a specific individual right to purchase broadcast time that does not depend upon a previous use by opposing candidates. In thus specifically creating a limited right of access for a very narrow class of persons—federal candidates—Congress clearly confirmed that, apart from such specific statutory provisions, there is no general right of access to broadcast facilities.

stations might be necessary to accommodate all the individuals who insist on airing their views through the microphone. If there are many such persons, as there undoubtedly are, the results would be, first, to crowd most or all of the better programs off the air, and second, to create an almost insoluble problem, i.e., how to choose from among an excess of applicants who shall be given time to address the public and who shall exercise the power to make such a choice." 3 F.R.C. Ann. Rep. at 33.[78]

Finally, in 1934 Congress put any remaining doubt as to its intentions to rest by including in the Communications Act a provision that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." Section 3(h), 47 U.S.C. § 153(h). As this Court has noted, Section 3(h) represents an expression of Congress' view that "broadcasters are not common carriers and are not to be dealt

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[78] The Radio Commission's construction of the 1927 Act in this respect is particularly significant, since the provisions of the Act were transposed, more or less intact, into the Communications Act of 1934. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *NBC, supra*, 319 U.S. at 213-14. The views of the Radio Commission on this point were made explicit to Congress in conjunction with its consideration of the Communications Act of 1934. In that year, Chairman Sykes of the Radio Commission testified against a bill which would have forbidden discrimination by any licensees against programs sponsored by religious, charitable or educational associations, effectively guaranteeing such groups an individual right to purchase broadcast time. Chairman Sykes pointed out that this proposal was "directly contrary to broadcasting as it has grown up in the United States prior to the Act of 1927 and is directly contrary to the theory of broadcasting under the Act under which we operate. . . ." Chairman Sykes also stated that the Radio Act of 1927:

> "puts upon the individual licensee of a broadcast station the private initiative to see that those programs that he broadcasts are in the public interest .... Then that act makes those individual licensees responsible to the licensing authority to see that their operations are in the public interest." *Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. (1934), pp. 349-52.

with as such." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940). The courts have repeatedly recognized that licensees are responsible for selecting broadcast material that, in their judgment, serves the needs and interests of the public in the communities they are licensed to serve.[74]

In recognition of the principle that the obligation of the broadcaster runs to the public, rather than to individuals and groups seeking to present their particular views, the Commission adopted the fairness doctrine to ensure that the public's need for information would be vindicated. The fairness doctrine was first set forth in detail in the Commission's 1949 *Report on Editorializing*, 13 F.C.C. 1246 (1949), and was incorporated into the Communications Act in 1959.[75]

The fairness doctrine requires broadcast licensees to cover significant public issues, and to present contrasting views on those issues. See generally *Red Lion*, *supra*, 395 U.S. at 369, 377-78. As the Commission made clear in its opinion in the present case, this duty may not be carried out by licensees in a bland fashion, with all viewpoints filtered through the licensee itself.[76] Nor may licensees refuse to present particular

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[74] *E.g.*, *FCC* v. *Sanders Bros. Radio Station*, *supra*; *McIntire* v. *William Penn Broadcasting Co.*, *supra*; *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, *supra*; *Regents of New Mexico College of Agriculture & Mechanic Arts* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900, 905-06 (10th Cir. 1947); *Pulitzer Pub. Co.* v. *FCC*, 68 App. D.C. 124, 126, 94 F.2d 249, 251 (1937).

For a detailed exposition of the nature of licensee responsibility for all broadcast material—both program and commercial matter—see *Report and Statement of Policy Re: Network Programming Inquiry*, 25 Fed. Reg. 7291 (1960).

[75] 73 Stat. 557 (1959), amending Section 315 of the Communications Act, 47 U.S.C. § 315. See *Red Lion*, *supra*, 395 U.S. at 381-85.

[76] App. 259.

views because they disagree with them.[77] They must present "representative community views and voices" on public issues and "some of the voices must be partisan. A policy of a licensee of confining itself to presenting views in a bland, inoffensive manner and of excluding partisan voices would run counter to the 'profound national commitment' that debate on public issues should be uninhibited, robust, and wide-open."[78]

But the hallmark of the fairness doctrine is licensee responsibility, and its touchstone is the public's interest in being informed. The fairness doctrine is implemented through licensee judgments as to which issues should be covered and which spokesmen presented. Licensees may reject requests for time to speak on the ground that the issue in question is insignificant, or that the views in question have already been presented or can be presented in some more effective fashion.[79] In short, licensees have discretion—within the limits of reasonableness—to choose how best to present opposing views on public issues in order to ensure that the frequencies they are assigned will be used to serve the interests of the listening and viewing public. The fairness doctrine is based on the firm

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[77] *Ibid.*

[78] App. 259, citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

The fairness doctrine is enforced through the license renewal process, through Commission rulings in response to individual complaints and through specific regulations dealing with personal attacks and political editorializing. See *Red Lion, supra*, 395 U.S. at 373-75. To ensure that licensees are continually informed as to the needs and interests of the public they serve, the Commission requires in-depth, comprehensive surveys of community leaders and members of the general public as a basis for programming proposals in connection with license renewal applications. See *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971).

[79] *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251-52 (1949).

recognition that the statutory scheme established by Congress is one based on licensee responsibility to serve the public, not on an indiscriminate right of access to the airwaves.[80]

2. *The Existing System of Broadcast Regulation Vindicates the First Amendment Interest of the Public in Being Informed.*

As Judge McGowan pointed out in the court below,[81] and as prior decisions make clear,[82] the public interest in being informed is vindicated by the Commission's fairness doctrine and related policies.

In the light of the Congressional scheme, it would require strong evidence to establish that the fairness doctrine and the existing broadcasting system have failed to satisfy the First Amendment interest of the public in full and robust discussion. Despite its acerbic criticism of television generally, the court below made no such finding. Nor has the Commission—which is the expert

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[80] App. 266. See also *Green* v. *FCC*, 144 U.S. App. D.C. 353, 358, 447 F.2d 323, 328 (1971); Loevinger, *Free Speech, Fairness and Fiduciary Duty in Broadcasting*, 34 LAW & CONTEMP. PROB. 278, 291 (1969).

[81] App. 490.

[82] In *Red Lion*, this Court found that the existing regulatory scheme, including the fairness doctrine, "enhanced" First Amendment interests. 395 U.S. at 375. See also *Office of Communications of United Church of Christ* v. *FCC*, 138 U.S. App. D.C. 112, 117, 425 F.2d 543, 548 (1969); *Democratic National Committee* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1637, decided Feb. 2, 1972), *petition for cert. pending* (Oct. Term, 1971, No. 71-1405):

> "The importance of the fairness doctrine is neither academic nor is it an administrative nicety.... The importance of the doctrine is evident and it is the manifest intention of the Commission to maintain it as a viable instrument in protecting the right of the public to be fully informed on controversial issues." Slip op. at 15-16. (Footnote omitted.)

body chosen by Congress to assure that broadcasters serve the public interest. To the contrary, the Commission concluded in this case that the existing system serves the First Amendment interest of the public in being informed and that requiring licensees to sell time would not contribute to the goal of an informed public.

Nothing in the record before the Commission and the court of appeals supports any claim that the present system, including the fairness doctrine, does not serve the public interest in securing full information, or that the creation of an individual right of paid access is necessary to ensure the airing of partisan views on public issues. Indeed, to the extent that there is evidence in this record as to the practices of licensees, it fully supports the Commission's view that the regulatory scheme chosen by Congress and the Commission assures robust debate on public issues and the presentation of the views of partisans.

Thus, in the *BEM* case—involving a demand to purchase advertising time to present views opposed to the Vietnam War—Station WTOP demonstrated that it had comprehensively presented a large number of opposing viewpoints on the War, including the very views espoused by BEM.[83] Similarly, as part of its response to DNC's request for declaratory ruling, CBS submitted to the Commission a lengthy exhibit detailing the coverage of the Vietnam War by the CBS Television Network and WCBS-TV (New York City).[84] That exhibit amply showed how the journalists of CBS News and WCBS-TV have provided a broadly informative presentation of representative views on the War issue and ample direct exposure for partisans and partisan views.

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[83] App. 313-15, 352.

[84] App. 81-242.

On the basis of these showings it is difficult to understand how requiring WTOP—or CBS—to sell advertising time to discuss the issue of the Vietnam War, or to present the views of BEM in particular, could materially contribute to a better understanding of this significant issue.[85] The court of appeals, however, fashioned a new constitutional right that would compel the Commission to require broadcasters such as WTOP and CBS to sell additional time for the presentation of views on the Vietnam War, even though that issue has been fully and fairly covered and even though the very view sought to be expressed in editorial advertisements may have been presented hundreds of times in the course of the broadcasters' journalistic coverage of that issue.

The court below reached a similar result with respect to the DNC request for declaratory ruling even though DNC did not indicate what issues and views it desired to discuss in purchased time and made no effort to establish that any particular views espoused by DNC—

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[85] As another panel of the District of Columbia Circuit aptly observed: "[W]e cannot conceive that any live American has been left uninformed about the desirability or undesirability of military service, the draft, or the Vietnam War." *Green* v. *FCC*, *supra*, 144 U.S. App. D.C. at 359, 447 F.2d at 323. Moreover, radio and television stations are not the only sources of public information on controversial issues or the only forums available for speech. As the court of appeals stated in *Democratic National Committee* v. *FCC*, *supra*, slip op. at 37-38:

> "Daily all of the media—not merely broadcast media—carry stories, articles and reports by opponents to the President, from the opposition party as well as his own party. In this nation the varying viewpoints are available to any person seeking to hear or read them. A citizen desiring to be informed need only pick up a newspaper or news magazine, flick on his radio, or tune in his television. Information indicative of all viewpoints is available merely for the seeking."

In addition, as the Commission noted in its opinion in this case, new forums for speech on public issues will be created with the growth of CATV systems, which, with their greater channel capacity, can accommodate "public access" channels. App. 266.

or anyone else—had not been presented. Indeed, it is clear that Democratic Party spokesmen have been given ample broadcast opportunities to present their views directly. CBS, for example, pointed out below that it would sell advertising time to political parties.[86] It also pointed out that it devotes substantial time to presenting the views of DNC and other Democratic spokesmen, not only in news and information broadcasts, but also in unedited presentations such as responses to Presidential State of the Union addresses and "Loyal Opposition" broadcasts. See *Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. D.C. ——, 454 F.2d 1018 (1971).

The record before this Court thus offers not the slightest support for a finding that the public's interest in being informed through vigorous discussion of public issues is not being served under the existing regulatory system or that broadcasters have discriminated against the discussion of public issues. Nor does it offer the slightest support for imposing a requirement that broadcasters sell advertising time for the presentation of partisan announcements.

However, even if there were evidence in this case that the public interest in being informed was not being served, the remedy chosen by the court of appeals, as we now show, is utterly inappropriate.[87]

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[86] App. 58.

[87] The remedy would lie with the Commission, which is now in the process of completing a comprehensive inquiry designed to determine whether the fairness doctrine is fully achieving the goal of an informed public. *Notice of Inquiry*, Docket No. 19260, 30 F.C.C. 2d 26 (1971).

C. The Right of Paid Partisan Access Created by the Court of Appeals Would Interfere with the Paramount Interest of the Public in Being Informed and Would Lead to an Increase in Government Control of Broadcast Speech Which Would Be Inconsistent with the First Amendment.

As the Commission concluded in this case—based on years of experience in administering the fairness doctrine—the public's interest in access to information on public issues would be undermined by a requirement that broadcasters sell time for the presentation of individual views. This judgment was shared by Judge McGowan in his dissent in the court of appeals. As we have shown, it is also a judgment fully shared by Congress.

In a limited-time medium such as broadcasting, the public's interest in access to information cannot be served by a common carrier approach, in which individual views are aired on a first-come, first-served basis. Judgments as to which subjects should be covered and which speakers should be heard—and to what extent—must be made by someone. Congress and the Commission have wisely chosen to leave these choices to licensees acting as trustees for the public—and not to the government. The system can function properly, however, only when licensees enjoy the discretion that Congress intended. As the District of Columbia Circuit recently put it, the fairness doctrine "can only succeed when the licensee exercises that discretion upon which he is instructed to call upon in dealing with coverage of public issues." [88]

Ironically, it is precisely this element of licensee responsibility so central to the scheme upheld in *Red Lion* that led the court below to find the existing regulatory scheme constitutionally inadequate. And it is the element

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[88] *Democratic National Committee* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1637, decided Feb. 2, 1972) slip op. at 17, *petition for cert. pending* (Oct. Term, 1971, No. 71-1405).

that would be excluded from the new constitutional regime. The constitutional deficiency of the present regulatory scheme, the court below declared, is that it permits broadcast licensees discretion to judge "what issues are 'important,' how 'fully' to cover them, and the format, time and style of the coverage." The interests of the First Amendment can be satisfied, the court of appeals held, only if the Commission requires that individual members of the public have "initiative and editorial control." [89] The Commission may not permit a licensee "to exercise the same 'authoritative selection' in editorial advertising which he exercises in normal programming." [90]

While the court of appeals speaks in reassuring generalities about the power of licensees to impose "reasonable" limitations on the sale of advertising time for partisan presentations, the opinion excludes the exercise of any meaningful licensee judgment. It makes clear that licensees cannot be permitted to refuse to sell advertising time on the ground that similar or identical viewpoints have already been fully presented; or that the issue to be discussed is trival; or that there are significant issues more deserving of coverage; or that the material sought to be presented is unduly inflammatory, offensive or otherwise unsuitable for broadcasting into the home.[91]

The court of appeals conceded that it is necessary that licensees exercise this discretion and responsibility with respect to "normal programming time," but it suggested that existing practices with respect to commercial advertisers demonstrate that there is no need for licensees to have such discretion and responsibility concerning advertising time.[92] The suggestion demonstrates that the court of

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[89] App. 469.

[90] App. 485.

[91] App. 471-73, 477, 485.

[92] App. 464, 484.

appeals has seriously misconceived existing advertising practices.

In considering requests for commercial time, licensees now exercise broad discretion in determining availability of time and scheduling of advertisements. Broadcasters can and do reject commercial advertisements on the ground that the claims made are false, defamatory, unsuitable for broadcast or contain discussion of controversial issues. Indeed, while the line between advertisements which treat controversial issues and those which do not may at times be difficult to draw, CBS, like many other broadcasters, has made a conscious and careful decision to exclude controversial issue discussion from commercial advertisements. CBS has adopted this policy because it believes that the public will best be served if the issues and speakers to be presented, format, length of presentation and the like are generally determined by broadcast journalists.[93] The court of appeals' decision would effectively require, not only that CBS sell time for editorial announcements, but that it abandon this salutary policy of excluding controversial issue discussion from commercial announcements for products and services.

Thus, broadcasters are now able to deal effectively with commercial advertisements for products and services precisely because of the discretion they have and use, and because they do not face constant legal challenges to their decisions. If every request for time by commercial adver-

[93] The CBS policy with respect to the discussion of controversial issues by advertisers has a long history. CBS, at the very advent of commercial television, concluded that the interests of the listening and viewing public would be far better served by a system in which news, information and controversial issue discussion was in general presented under the journalistic supervision of CBS News, free of advertiser domination or influence. See Comments of CBS, FCC Docket No. 12782, May 2, 1966, pp. 99-102.

tisers carried with it a constitutional claim cognizable first before the Commission and then before the courts, licensees would face serious problems in administering the existing system of broadcast commercial advertising. Under the court of appeals' decision, the flexibility that licensees now exercise with respect to commercial advertising would be denied with respect to editorial advertising.[94]

Moreover, by depriving licensees of the discretion essential to the fairness doctrine, the court of appeals' decision would undermine the public's interest in being informed, and thus would be contrary to the policies of the First Amendment.[95] Eliminating the mechanism of licensee responsibility would create a vacuum to be filled by the haphazard choices of individuals and groups who have neither professional journalistic responsibility nor any statutory obligation to serve the public. In many cases—since the licensee would have no control over what issues are discussed by those who purchase time—the result would be to require licensees to devote time to the presentation of views on stale or trivial issues rather than views on issues of greater significance. Overall coverage of public issues would inevitably be skewed, with some issues receiving more attention than they merit

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[94] The fact that some broadcasters may now choose to sell some advertising time for public issue discussion does not, again contrary to the court's suggestion (App. 484), demonstrate the workability of the constitutional requirement imposed by the decision below. For broadcasters who now sell such time do so with the freedom—indeed the obligation, under the fairness doctrine—to make their own judgments concerning the importance of the issues, the amount of time previously devoted to the views in question, the appropriateness of the speakers who desire to purchase time, and similar questions. Resolution of such questions is essential to the proper discharge of licensee responsibility. The decision below would deny licensees this critical discretion.

[95] The Commission found that the relief sought by DNC and BEM would have precisely this result. App. 263-69.

and other issues less attention than they merit or no attention at all.[96]

The court of appeals' opinion, moreover, would create a new government-imposed requirement that would favor those with the financial resources to purchase broadcast time. At present, the fairness doctrine assures that the public will have access to contrasting viewpoints on significant public issues regardless of the relative financial resources of the partisans holding views on the various sides of those issues. The particular speakers who appear are chosen, not by the size of their pocketbooks, but by their newsworthiness and appropriateness as spokesmen.[97] Under the court of appeals' decision, however, only those who could afford to purchase time would have an enforceable individual right to do so and to speak on issues of their own choosing. As the Commission aptly put it, "the pub-

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[96] The problems of requiring the sale of advertising time for partisan presentation would be especially acute if the fairness doctrine applied in this area, since its application would require broadcasters to present replies to views expressed by those who have purchased time. In view of the burdens that application of the fairness doctrine would impose on broadcasters and the general scarcity of broadcast time, Commissioner Johnson recognized that the fairness doctrine might have to be suspended with respect to advertising time sold for discussion of public issues. App. 281.

Suspension of the fairness doctrine in this area might well be both appropriate and necessary. As Commissioner Cox pointed out in his concurring statement in the *BEM* case, application of the fairness doctrine would lead to an erosion of the advertising revenues upon which the broadcast press is based. App. 369. Commissioner Cox also recognized that requiring free time for replies may well be appropriate where necessary to ensure fairness in situations in which a broadcaster has *elected* to present one side of a controversial issue on a paid basis; but it is inappropriate in situations in which the licensee has been *required* to sell time for the initial paid presentation. App. 369.

[97] See, *e.g.*, CBS Comments, App. 51, 59.

lic's agenda for discussion of public issues" would be set "by the affluent." [98]

Under existing Commission policy, licensees may sell time for discussion of public issues, subject to the fairness doctrine. This practice, of course, does not violate the First Amendment.[99] But the First Amendment cannot plausibly be held to *require* the creation of a new right exercisable only by the affluent. Indeed, in other areas, a government-mandated preferred position for the affluent has been held to be unconstitutional.[100]

The court below was troubled by the possibility that the requirement it was adopting would lead to domination of the broadcast medium by affluent partisans.[101] It suggested that this result could be avoided by the adoption of "reasonable regulations" by the Commission limiting, for example, the "amount of advertising time that would be sold to one group or to representatives of one particular narrow viewpoint." [102] Such "reasonable regulations," however, would still leave the *agenda* of discussion to be set by the affluent rather than by licensees responsible to the public. And the inevitable differences of view as to both the reasonableness and application of the regulations could lead only to repeated appeals to the Commission and the courts to decide who shall speak, and on what subjects, and how often.

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[98] App. 263.

[99] Even a governmental body, for example, can impose a reasonable charge for the use of governmental facilities or for services. See, *e.g.*, *Bullock* v. *Carter*, 405 U.S. 134, 148-49 (1972).

[100] See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (state may not deny transcripts to indigent appellants); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971) (state may not deny indigents access to courts in divorce actions); *Bullock* v. *Carter*, 405 U.S. 134 (1972) (invalidating state requirement of high filing fees for candidates); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax).

[101] App. 484.

[102] App. 485.

This necessarily follows from the fact that the court of appeals' goal of dispersing the decision-making power now lodged in licensees among individual members of the public simply cannot be achieved. The public interest in access to contrasting views on important issues cannot be left to the happenstance of a first-come, first-served rule or some other mechanical allocation of time. Judgments as to which subjects should be covered and which speakers should be heard must be made by someone—either by the licensee or by the government.

The likely end result of the court of appeals' decision, we submit, is that these judgments would increasingly be made by the government. Take, for example, the court of appeals' suggestion that there might be a rule limiting "the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint." [103] The application of such a rule would obviously require judgments including (1) the time limit to be imposed and (2) whether particular groups or spokesmen in fact represent "one narrow viewpoint." Both types of judgments are difficult ones; indeed, the court itself argues that the latter judgment is particularly subtle—too subtle to be left in the hands of broadcast licensees, even subject to Commission review for unreasonableness.[104] Any person or group denied the right to purchase advertising time under such a rule would have a claim—a constitutional claim—that would have to be resolved by the Commission and, eventually, the courts.

Thus, the ironic and dangerous result of a decision intended to disperse responsibility for choice of views and spokesmen from broadcast licensees to the public at large would be to increase drastically the role of the govern-

[103] App. 485.

[104] App. 472.

ment in making these choices. It would be difficult to imagine a course more at odds with the First Amendment. Governmental dictation of what issues, views and spokesmen are to be heard is the heart of censorship and the antithesis of a free broadcast press.[105] If the First Amendment stands for anything, it represents a commitment to the proposition that the interest of an informed public will better be served by having individual journalists rather than the government select material to be presented in the press.

In sum, the new requirement created by the court of appeals would distort coverage of issues, permit the affluent to set the agenda for discussion, and lead inevitably to a vastly increased role for the government in choosing the views and speakers to be aired. We submit that this result is incompatible with the First Amendment.

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[105] See, *e.g.*, CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 641 (1965).

II. IN ANY EVENT, THE FIRST AMENDMENT DOES NOT OPERATE AS A LIMITATION ON THE ACTION OF LICENSEES IN SELECTING SPOKESMEN ON PUBLIC ISSUES BECAUSE BROADCASTER ACTION IS NOT "STATE ACTION."

The court of appeals' decision is also vulnerable on an independent ground: it erroneously held that broadcast licensees must be viewed as the state and that the First Amendment therefore imposes direct limitations upon their actions.

Before the decision below, no court had suggested that broadcasters, or other competitive journalistic media,[106] are subject generally to the limitations which the First Amendment imposes upon government.[107] The First and Third Circuits, indeed, had held the contrary [108] and it was generally accepted that, while Congress and the Commission have certain powers to regulate the broadcast medium, broadcasters remain vital organs

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[106] See note 131, *infra*.

[107] The court below erroneously suggested that *Red Lion* held that the First Amendment applies as a limitation on broadcaster action because there was no other ground for upholding the Commission's fairness doctrine. In fact, the fairness doctrine could be, and was, sustained by the Court on the ground that it was authorized by the Communications Act, which represents an exercise of Congress' power under the Commerce Clause, not the First Amendment.

Red Lion neither holds nor in any way suggests that broadcaster action is the equivalent of action by the government. As the court in *Post* v. *Payton*, 323 F. Supp. 799, 803 (E.D.N.Y. 1971), put it, this Court in *Red Lion*—

> "did not hold that the licensee's actions were governmental action. It merely held that a broadcast licensee's First Amendment rights were not abridged by Congress or the Commission by the application of the latter's 'fairness doctrine' or the regulations and orders promulgated thereunder."

[108] See pp. 19-20, *supra*.

of the free press, distinct from the government and protected by the First Amendment.[109]

Despite this fundamental separation of the broadcast press from the government, the court below found that "state action" was involved. It relied on three factors—(1) the licensing and regulation of broadcasters by the Commission,[110] (2) the Commission's specific acquiescence in the refusal of broadcasters to sell time for the discussion of controversial issues,[111] and (3) the "suitability" of the broadcast medium for the communication of ideas.[112] As Professor Jaffe has pointed out,[113] none of those factors can withstand scrutiny as a basis for the conclusion that state action is present in this case.

First, the existence of governmental licensing and regulation alone has never in the past been held by this Court to be a sufficient basis for a finding of state action.[114] Although such a theory has been repeatedly

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[109] *E.g.*, *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). This fundamental principle is reflected in Section 326 of the Communications Act. See *Post* v. *Payton*, *supra*, 323 F. Supp. at 803.

[110] App. 459-61.

[111] App. 461-63.

[112] App. 463-64.

[113] Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 769-71 783 (1972). As Professor Jaffe noted (*id.* at 783):

> "We are all regulated in thousands of ways in our use of our houses and our streets . . . . Yet because we believe it to be important to distinguish the private and public spheres, our acts, our failures to act, our prejudices, and our misconducts do not become acts of government. . . . By merely tolerating my action the state does not adopt it as its own; the failure of a court to prohibit such conduct does not make it the conduct of the court."

[114] The court of appeals misread *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), in suggesting that it holds otherwise. In that case, the Court found that a restaurant leasing pub-

urged upon this Court by individual Justices in various cases,[115] and would have led to an easy resolution of the state action question in those cases, it has never been adopted.[116] Apart from the decision below, those courts which have faced the issue of whether the regulatory

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licly owned and constructed space from a governmental authority was engaged in state action because, in the light of all the facts, the state was in effect a "joint participant" in the activity. No such situation exists here. Indeed, the Congressional scheme, including Section 326 of the Communications Act, 47 U.S.C. § 326, specifically bars the Commission from jointly participating with broadcasters in the selection, preparation, and presentation of broadcast material. See also *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), discussed below.

We note that the existence of government licensing and regulation has been argued as a ground for finding state action this term in No. 1292-71, *Moose Lodge No. 107* v. *Irvis*, *cert. granted*, 401 U.S. 992 (1971). (The decision below is reported as *Irvis* v. *Scott*, 318 F. Supp. 1246 (M.D. Pa. 1970). The case was argued on March 7, 1972.) In the *Irvis* case, the district court held that in the circumstances of that case, racial discrimination by a private club holding a liquor license was state action prohibited by the Fourteenth Amendment. The court relied on the fact that the state held a liquor monopoly and supplied all the liquor sold by the private club. In addition, the court noted that the state had asserted regulatory control over the sale of liquor, had otherwise regulated the activities of those holding liquor licenses, and had affirmatively required that "every club licensee . . . adhere to all the provisions of its constitution and bylaws" (318 F. Supp. at 1250), which in the case of this particular club required racial discrimination.

[115] See *Garner* v. *Louisiana*, 368 U.S. 157, 181-85 (1961) (Douglas, J., concurring); *Lombard* v. *Louisiana*, 373 U.S. 267, 281-83 (1963) (Douglas, J., concurring); *Reitman* v. *Mulkey*, 387 U.S. 369, 384-87 (1967) (Douglas, J., concurring).

[116] In *Bell* v. *Maryland*, 378 U.S. 226, 333 (1964), three justices dissented from the Court's refusal to reach the question of whether state action is involved in state trespass convictions of blacks for entering racially segregated private restaurants. They stated: "Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices."

scheme of the Communications Act converted broadcasters' actions into state action have held that it did not.[117]

The only cases in which this Court has held that the existence of governmental regulation in and of itself makes private action state action are ones where the government has encouraged,[118] required [119] or enforced[120] the action taken by the private party. Here, no such situation exists. Broadcasters have not sought the assistance of the Commission, or any other arm of the government, to enforce their policies concerning the sale of time. In this case, the Commission has made it clear that it was only declining to compel broadcaster action; it was not requiring or encouraging broadcasters to refuse to sell time for the discussion of controversial issues.[121] Indeed, the record does not indicate any general refusal by broadcasters to make such sales.

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[117] *McIntire* v. *William Penn Broadcasting Co., supra; Massachusetts Universalist Convention* v. *Hildreth & Rogers Co., supra; Post* v. *Payton, supra.* See also Jaffe, *The Editorial Responsibility of the Broadcaster: Reflection on Fairness and Access*, 85 HARV. L. REV. 768, 783 (1972).

[118] Such encouragement may take the form of governmental statements urging the action taken by the private party (*e.g., Lombard* v. *Louisiana*, 373 U.S. 267 (1963)); the imposition of additional burdens upon those acting in a particular fashion (*e.g., Robinson* v. *Florida*, 378 U.S. 153 (1964)); or specific authorization for the private activity (*e.g., Reitman* v. *Mulkey*, 387 U.S. 369 (1967)). See also *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), discussed in the text below.

[119] *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963); *Gober* v. *Birmingham*, 373 U.S. 374 (1963); *Avent* v. *North Carolina*, 373 U.S. 375 (1963).

[120] Cases like *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), and *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957), hold "that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment." *Griffin* v. *Maryland*, 378 U.S. 130, 136 (1964).

[121] "[W]e should note that there is, of course, no Commission policy thwarting sale of time to comment on public issues." App. 265.

The court below relied on acquiescence by the Commission as its second ground for finding state action. But government "acquiescence" in the sense of failure to compel or prohibit a private course of conduct does not transform private action into state action. In such decisions as *Evans* v. *Abney*, 396 U.S. 435, 445 (1970) [122] and *Palmer* v. *Thompson*, 403 U.S. 217 (1971) [123] this Court has made it plain that it takes more than acquiescence by a government agency to make private action the action of the state. The court below neither cited nor distinguished these cases, relying instead on the earlier decision in *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), for the proposition that agency acceptance of a private policy is the equivalent of action by the state.[124]

Pollak, while rejecting the constitutional claim on the merits, held that the provision of piped-in music to riders by a municipal common carrier constituted state action because this "service" had been specifically approved by the regulatory agency. As Justice Harlan pointed out, "state action [in *Pollak*] was explicitly premised on the close legal regulation of the company by the public utilities commission and the commission's approval of the particular action under attack." [125] The present case is clearly distinguishable.

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[122] In *Evans* the Court held that a state court could properly refuse to apply the doctrine of *cy pres* to delete a "whites only" clause in a testamentary trust. The consequence of this acquiescence by the state court was that the property automatically reverted to the heirs.

[123] In *Palmer*, the Court allowed the City of Jackson, Mississippi to surrender its lease on a swimming pool which had been operated on a desegregated basis to a private lessor (the YMCA) which operated it only for whites.

[124] App. 462.

[125] *Evans* v. *Newton*, 382 U.S. 296, 320 (1966) (Harlan, J., dissenting).

First, this case does not involve the "close legal regulation" of the private party's action that existed in *Pollak*. In that case, the agency had broad authority "to fix and enforce standards of service" for the bus company.[126] All aspects of bus company service—from rates to music—were clearly within the agency's authority. By contrast, Congress has specifically determined that broadcasters are not common carriers [127] and has barred censorship of broadcasting programming.[128] Moreover, the Commission has refrained from a detailed regulation of broadcast advertising and its unexercised power in this field does not preempt the regulatory power of state governments. *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 429-32 (1963). We submit that the Commission's exercise of regulatory authority over broadcast advertising time similarly is not sufficiently pervasive to charge the government with responsibility for the policies of those broadcasters who decline to sell advertising time for the discussion of public issues.

Second, unlike the public utilities commission in *Pollak*, which, after extensive hearings, affirmatively approved piped-in music as in the public interest, the Commission here has not adopted the policy of any particular broadcaster as its own. It did not make any finding that a refusal by a broadcaster to sell time served the public interest. The Commission determined only that neither the Communications Act nor Commission policies required such sale, and that broadcasters remained free to sell, or not to sell, time for such purposes. If such non-inter-

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[126] *Pollak* v. *Public Utilities Comm'n*, 89 U.S. App. D.C. 94, 97, 191 F.2d 450, 453 (1951), *rev'd*, 343 U.S. 451 (1952).

[127] Section 3(h), 47 U.S.C. § 153(h).

[128] Section 326, 47 U.S.C. § 326. See also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), where the Court stated "the Commission is given no supervisory control of the programs, of business management or of policy."

ference by a government agency or court could convert private action into state action, any meaningful distinction between the private and governmental spheres would be entirely obliterated. Private action could be readily converted into state action by any individual whose efforts to secure administrative or judicial action against private conduct were rejected by a governmental agency or court.[129]

Finally, the court below also found state action on the ground that the First Amendment applies to any medium "suitable" for the communication of ideas, relying on this Court's decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and a related court of appeals case which has since been heard and awaits decision by this Court.[130] The court below has seriously misread this Court's *Logan Valley* decision. That case, which held that labor union picketing of a retail store within a shopping center was protected by the First Amendment, did not rest upon a finding that such a location was "suitable" for speech activities. Rather, the Court reached that result on the ground that the shopping center involved was the "functional equivalent" of a public business district which, like public streets, had been held subject to the First Amendment in *Marsh* v.

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[129] See Jaffe, *supra*, 85 HARV. L. REV. at 783; Comment, *State Action Under the Equal Protection Clause of the Fourteenth Amendment and the Remaining Scope of Private Choice*, 50 CORNELL L.Q. 473, 498-99 (1964). See also *McGlotten* v. *Connally*, 338 F. Supp. 448, 458 (D.D.C. 1972), where a three judge court stated, "To find a violation solely from the State's failure to act would, however laudably, eliminate the state action doctrine. . . ."

[130] No. 71-492, *Lloyd Corp.* v. *Tanner*, 308 F.Supp. 128 (D. Ore. 1970), *aff'd*, 446 F.2d 545 (9th Cir. 1971), *cert. granted*, 404 U.S. 1037 (1972). The court below also relied on *Diamond* v. *Bland*, 3 Cal. 3d 653, 477 P.2d 733 (1970). In both the *Lloyd* and *Bland* cases the courts held that the decision in *Logan Valley* required that shopping centers allow virtually unlimited access for speech activities. In the *Lloyd* case this Court is now considering whether *Logan Valley* extends so far.

Alabama, 326 U.S. 501 (1946). Quite evidently, a broadcast station is not the "functional equivalent" of a public business district or a public street. If anything, it is the "functional equivalent" of a daily newspaper, for it performs the same information and journalistic functions.

This functional equivalency to newspapers, however, negates a finding of state action. The cases have uniformly rejected the notion that private newspapers—which are plainly "suitable" for the communication of ideas—are the "state" for purposes of application of the First Amendment. Rather, the courts have consistently concluded that, despite the valuable communications functions which they perform, and despite the many aspects of their activities that are regulated or supported by the state, private newspapers are not the equivalent of the government and are under no affirmative obligation to accept editorial or other advertising.[131] The courts have recognized that the crucial function of the press as a critic of the state can only be performed when it is independent of the state.

Thus, the conclusion that broadcasting is a suitable and vital means of communicating ideas and informing the public does not support a finding of state action. Rather, it emphasizes the need to keep it separate from government for purposes of the First Amendment. It was to assure such separateness that Congress enacted Section

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[131] See, *e.g.*, *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100 (D. Colo. 1971); *Chicago Joint Board, Amalgamated Clothing Workers of America* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971). In contrast are *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971), and *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969), where the courts required newspapers of *state-run* schools to provide access for editorial advertising. As discused above (note 50), the *Lee* and *Zucker* cases were incorrectly decided and, in any event, are distinguishable on other grounds.

326 of the Communications Act, 47 U.S.C. § 326, barring censorship by the Commission.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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